IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA,	:	
	:	
Plaintiff,	:	
	:	
v.	:	**Case No. 4:05-CV-329-GKF-PJC**
	:	
TYSON FOODS, INC., *et al.*,	:	
	:	
Defendants.	:	

STATE OF OKLAHOMA'S REPLY IN FURTHER SUPPORT OF ITS MOTION FOR SANCTIONS DIRECTED TO THE CARGILL DEFENDANTS FOR DISCOVERY MISCONDUCT [DKT. #2459]

Plaintiff, the State of Oklahoma ("the State"), hereby submits its reply in further support of its Motion for Sanctions Directed to the Cargill Defendants for Discovery Misconduct ("State's Mot.") (Dkt. #2459) and in response to the Cargill Defendant's ("Cargill") memorandum in opposition to the same ("Def.'s Opp.") (Dkt. #2598).

I. INTRODUCTION

Since at least the fall of 2005, Cargill possessed but did not produce information that was directly responsive to the State's discovery and is probative of Cargill's waste disposal practices and the resulting phosphorus and bacterial loading to the IRW. To the contrary, Cargill and its lawyers repeatedly denied the existence of such information. Nowhere in its Opposition does Cargill contest these facts.

Instead, Cargill argues that it properly viewed the two documents containing the relevant information — namely, the Grower Summary and Applications Chart (collectively, "Documents") — as attorney work product. (*See* Def.'s Opp. at 2-3.) Specifically, Cargill represents that the Documents "were prepared by and at the request of counsel" (*id*. at 2), and it

contends that they retained their work product status when provided to Cargill's then-consulting expert, Thomas Ginn (*id*. at 3). Therefore, Cargill asserts, it was not required to disclose the Documents' existence (*see* Def.'s Opp. at 4 (citing LCvR 26.4)), let alone contents, until the Court ordered it to turn over Dr. Ginn's considered materials (*see id*. at 7).[1] As for repeatedly denying that it even had knowledge of the facts contained in the Documents, all Cargill can muster is that its lawyers did not provide the Documents to its Rule 30(b)(6) witness, "so he could not have known of [them] when he was deposed." (*Id*. at 11.) Regardless, Cargill maintains, the State suffered no prejudice because, *inter alia*, the State already had sufficient information about Cargill's growers. (*See id*. at 9; *see generally id*. at 7-14.)

II. ARGUMENT

Cargill failed to provide the State with responsive and highly relevant facts that were immediately available to Cargill and/or under its control. Worse, those facts are directly contrary to statements made by Cargill in interrogatories, at deposition, and before the Court. As set forth in the State's Motion, based on the foregoing conduct, Cargill has violated Federal Rules of Civil Procedure 16(f), 26(e), and 26(g). (*See* State's Mot. at 12.) As set forth below, the work product doctrine is no defense to this conduct. Facts are not work product, and Cargill's opinion that the State already had all of the information it needs does not mitigate Cargill's failure to provide the State with all of the information to which the State is entitled.

[1] By way of background, Defendants initially retained Dr. Ginn as a consulting expert but subsequently converted him into a testifying expert. The State obtained the Documents after this Court rejected Cargill's argument that it was not required to produce materials that Dr. Ginn professed to have considered only in his capacity as a consultant and not as a testifying expert. (Dkt. #2356.)

A. There Is No Basis for Cargill's Refusal to Supply the State with Answers to the Factual Questions Posed in the State's Interrogatories

Facts are not work product. *See, e.g., Asarco LLC v. Americas Mining Corp.*, No. 07-6289, 2007 WL 3504774, at *9 (D. Idaho Nov. 15, 2007). Therefore, "the work product concept furnishes no shield against discovery . . . of the facts that the adverse party's lawyer has learned . . . or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." *Feldman v. Pollack*, 87 F.R.D. 86, 89 (W.D. Okla. 1980) (internal quotation marks omitted); *see also Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995) ("the work product doctrine . . . does not protect facts concerning the creation of work product or facts contained within work product").

Thus, even if the facts contained in the Documents were collected by its attorneys and assuming, *arguendo*, that the Documents themselves were attorney work product does not shield those facts from discovery through other means.[2] *See, e.g., Stern v. O'Quinn*, 253 F.R.D. 663, 687 (S.D. Fla. 2008) ("The work-product doctrine does not protect factual *information* from disclosure. Rather, it protects a party only from disclosing particular *documents* containing the information. To accommodate these principles, a party may propound interrogatories and take depositions to obtain the sought-after factual information." (emphases in original)). Yet, in response to the State's interrogatory requests for such facts as "'how the poultry waste [generated at its or its growers' facilities] was disposed of . . . and the amount disposed of in each particular manner'" (State's Mot. at 3 (quoting State's Interrog. #6)), Cargill responded that it had *no information* regarding the amounts of litter used by its growers (*id.*).

[2] Nonetheless, the State's position is that the Documents were *not* protected by the work product doctrine because they were of an entirely factual nature. *See Asarco*, 2007 WL 3504774, at *9 ("documents . . . of an entirely factual nature are not protected work product").

Accordingly, regardless of whether Cargill felt that it had a good faith basis for withholding the Documents themselves as attorney work product (*see* Def.'s Opp. at 2-3),[3,4] it had absolutely no basis for refusing to supply the State with answers to the factual questions posed in the State's interrogatories.

B. Regardless of Whether the Documents Were Work Product, Cargill Had No Right to Misrepresent Its Knowledge of Their Contents

As set forth in the State's Motion, "Cargill has sworn on three separate occasions that it has '***no information*** regarding the amounts of litter used by its independent contract growers. . . .'" (State's Mot. at 12 (quoting Cargill Resp. to Interrog. #6).) Indeed, as recently as June 18, 2009, Cargill stated in papers filed with this Court that it "'do[es] not generally know whether [its] individual contract growers in the IRW land-apply, sell, trade, or otherwise make use of the poultry litter generated by the Cargill Defendants' turkeys. . . .'" (State's Mot. at 4-5 (quoting Dkt. #2200 at 5).) Again, nowhere in its Opposition does Cargill deny that these statements were false. Rather, Cargill complains that the contents of the Documents should not "be deemed general corporate knowledge." (Def.'s Opp. at 11.) This argument is specious.

A party cannot limit interrogatory answers "to matters within his own knowledge and ignore information immediately available to him or under his control." *Miller v. Doctor's*

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[3] Although Cargill made a general objection to the disclosure of attorney work product, it claims that it was not required to identify specifically the Documents on a privilege log because "privilege logs need not list 'work product material created after the commencement of the action.'" (Def.'s Opp. at 4 (quoting LCvR 26.4).) This rule has no application to facts, however, because they are not work product. Nor does LCvR 26.4 provide safe harbor for a party that withholds documents that turn out not to constitute work product.

[4] It should be noted that this question is not answered by Cargill's 4½-page distraction regarding its position that documents initially provided to Dr. Ginn retained any applicable privilege even after he became a testifying expert. (*See id*. at 3-7.) This view assumes that the Documents and the facts contained therein were work product to begin with, which the facts — if not the Documents themselves — plainly were not. Either way, Cargill had no right to state that it had "no information" when that information was immediately available to it.

General Hosp., 76 F.R.D. 136, 140 (W.D. Okla. 1977). Rather, he is "required to give the information available to him, if any, *through his attorney*, investigators employed by him or on his behalf or other agents or representatives, whether personally known to the answering party or not." *Id*. (emphasis added). Indeed, in the seminal work product decision, *Hickman v. Taylor*, 329 U.S. 495 (1947), the Supreme Court stated that "[a] party clearly cannot refuse to answer interrogatories on the ground that the information sought is solely within the knowledge of his attorney." *Id*. at 504; *accord Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, No. 05-2164, 2007 WL 756631, at *4 (D. Kan. Mar. 8, 2007).

In *Heartland Surgical*, the plaintiff objected to certain discovery because the plaintiff claimed that it was unable to review documents marked as "Attorneys' Eyes Only" pursuant to the protective order in force the case. 2007 WL 756631, at *1. The defendants argued — and the court agreed — that the plaintiff was "charged with the knowledge available to its agents, *including counsel*. . . ." (emphasis added)). *Id*. at *3-*4. The court rejected the plaintiff's work product and attorney-client privilege arguments, noting that the defendants sought "responses to interrogatories and requests for admission concerning *facts* that support [the plaintiff's] claims." *Id*. at *5 (emphasis added); *see also id*. ("the attorney-client privilege protects only communications and *not* any underlying *facts*" (first emphasis added)).

In the present case, Cargill was free to examine the Documents, but it claims that its lawyers did not provide them to its Rule 30(b)(6) designee, Timothy Maupin.[5] (Def.'s Opp. at 11.) This is no excuse for affirmatively stating that Cargill did not have the information contained in the Documents. Simply stated, Cargill is charged with the knowledge available to

[5] It bears noting that Cargill offers no explanation for its misrepresentations in interrogatory answers and in pleadings signed by counsel with direct knowledge of contradictory facts.

its attorneys. *Heartland Surgical*, 2007 WL 756631, at *5. Thus, even if Cargill wished to take the position that it was not obligated to provide the State with the facts requested by the State's interrogatories, the proper response was not falsely to deny having that information, even if it was known only to Cargill's lawyers. Rather, Cargill should have answered truthfully that it had that information but objected to its production.

C. The State Has Suffered Prejudice

The prejudice to the State is obvious. For years, Cargill has deprived the State of information that is relevant to Cargill's waste disposal practices and the resulting phosphorus and bacterial loading to the IRW. The facts contained in the Documents include the amounts, dates, and locations of disposal, and they establish that Cargill has disposed of a substantial mount of waste in the IRW. The State has been denied the benefit of this information in developing its case, and Cargill's late disclosure cannot make up for that fact.

Yet, Cargill asks the Court to ignore its egregious conduct on the ground that the State suffered no prejudice. Specifically, Cargill remarks that: (1) Cargill produced Dr. Ginn's considered materials promptly when ordered to do so (Def.'s Opp. at 7); (2) the State subsequently re-deposed Dr. Ginn (*id*. at 7-8); (3) the State already had "all the information about contract grower files that [Cargill] kept in the ordinary course of business" (*id*. at 8-10); (4) the Court ultimately considered the Documents in entertaining the parties' motions for summary judgment (*id*. at 10-11); (5) Cargill's representatives did not provide untruthful testimony because they did not know about the Documents (*id*. at 11-13); and (6) the Documents were not relevant to the depositions of Drs. Davis and Murphy because Cargill had not shared the Documents with them (*id*. at 13-14). Each point is addressed in turn.

First, the State plainly does not seek sanctions based on Cargill's position with respect to the disclosure of Dr. Ginn's considered materials. The Documents and the facts contained therein were independently responsive to the State's discovery, and the State seeks sanctions because Cargill not only failed to provide that responsive information but also affirmatively denied possessing it.

Second, in the same vein, the relevance of the facts withheld from the State transcends their influence on Dr. Ginn. Thus, having the benefit of the Documents in deposing Dr. Ginn went only a fraction of the way toward mitigating the prejudice caused by Cargill's misconduct.

Third, it is not Cargill's place to decide how much and what kind of evidence is adequate for the State's case. That is the jury's role, and the State is entitled to discover and present *all* relevant and admissible facts in support of its claims. Regardless, Cargill is flatly wrong to intimate that the State possessed information equivalent to the facts contained in the Documents. To say the least, the location of a Cargill grower's farm is not as probative of Cargill's responsibility for IRW pollution as the location of that farm coupled with the amount of poultry waste generated and land-applied on it.

Further, Cargill misleads the Court when it asserts that it provided the State with all of the information "kept in the ordinary course of business." (Def.'s Opp. at 8.) It is evident that the Applications Chart was assembled using data required for the development and implementation of Arkansas Nutrient Management Plans. *See, e.g.*, Ark. Code Ann. § 15-20-1108(c)(3). Although Cargill did not keep that data "in the ordinary course of business," its growers did. *See* 138 Ark. Code R. §§ 2203.6(A), 2204.4(A) ("Records . . . shall be maintained by the owner and Operator . . . for a minimum period of five years. . . ."). That information was unavailable to the State because of Arkansas laws calculated to shield it from discovery. *See,*

e.g., *id*. ("[s]uch records shall not be public records"). But Cargill obtained the information and used it to assemble the Applications Chart. Thus, at a minimum, Cargill should have produced that information to the State, regardless of whether it was kept "in the ordinary course of business."

Fourth, Cargill's position that the State has not been prejudiced because the Court permitted the State to supplement the summary judgment record is myopic. The State was prejudiced by the very fact that it had to bring that motion, and because it had to incorporate this new and highly relevant evidence into arguments that had been fully briefed. More importantly and as set forth in the State's Motion, the State was foreclosed from using the facts contained in the Documents to conduct expert investigations, propound discovery, and otherwise build its case. (*See* State's Mot. at 5.) In addition, the State was forced to expend its resources to research and investigate facts and evidence to attempt to learn the truth of matters that, it turns out, Cargill and its attorneys knowingly had concealed.

Fifth, as previously discussed, Cargill's representatives did provide untruthful testimony because they are charged with the knowledge of Cargill's attorneys. Indeed, it must be said that Cargill's false statements have prejudiced not only the State but also this Court. As the District of Colorado put it:

> A witness' decision to testify falsely . . . threatens to erode confidence in the judicial system as a whole. Moreover, false testimony, once revealed, engages the Court in distracting collateral proceedings such as these that drain the Court's resources without advancing the merits of the litigation, exacerbating the harm to the judicial system.

Pappas v. Frank Azar & Assocs., P.C., No. 06-cv-01024, 2007 WL 2683549, at *11 (D. Colo. Sept. 7, 2007).

Sixth, regardless of whether Cargill shared the Documents with Drs. Davis and Murphy, the State was foreclosed from questioning them about the data contained therein and the impact that data might have had on their opinions had the data been provided to them. Indeed, it is telling, in and of itself, that Cargill chose to withhold such information from its experts.

D. Severe Sanctions Are Warranted

Finally, Cargill seriously downplays its misconduct when it claims that the sanctions proposed by the State are disproportionate to it. (Def.'s Opp. at 14.) First, the sanctions sought by the State are none other than those expressly provided for by the Federal Rules. *See infra*, part III. Second, Cargill's misconduct appears to be willful and, thus, merits "more severe sanctions." (*See* State's Mot. at 7 n.4 (citing *Millsap v. McDonnell Douglas Corp.*, 162 F. Supp. 2d 1262, 1308-09 (N.D. Okla. 2001)).) Third, the State has asked the Court to fashion "whatever other relief [it] deems just given the circumstances" (*id.*), which might include other less severe sanctions (e.g., an adverse inference instruction). Fourth, the conduct at issue here was not the conduct of corporate bureaucrats who are unschooled in the law. As set forth by Cargill, this was the deliberate conduct of its lawyers. Such conduct erodes our system and frustrates the ends of justice that attorneys are sworn to serve.

III. CONCLUSION

For the reasons set forth above and in the State's Motion, the Court should:

(1) direct that, for the purposes of this action — including trial — it shall be established fact that Cargill has placed poultry waste in a location where it is likely to cause runoff or pollution of the State's waters, *see* Fed. R. Civ. P. 37(b)(2)(i);

(2) prohibit Cargill from introducing evidence or argument that it or its independent contractors have not placed any poultry waste in a location or locations where it is likely to runoff or pollute the State's waters, *see* Fed. R. Civ. P. 37(b)(2)(ii);

(3) prohibit Cargill from introducing evidence or argument that the State lacks evidence of Cargill-specific waste disposal practices or causation, *see* Fed. R. Civ.

P. 37(b)(2)(iii);

(4) require Cargill and/or its attorneys to pay the State's reasonable expenses, including attorney's fees, caused by Cargill's misconduct, *see* Fed. R. Civ. P. 16(f)(2), 26(g)(3), 37(c)(1)(A); and

(5) grant whatever other relief the Court deems just given the circumstances.

Respectfully Submitted,

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